United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

277

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,942

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UNITED STATES OF AMERICA

-v-

JOHN J. HARRISON, JR.

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

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April 5, 1971

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QUESTION PRESENTED *

Whether appellant was denied his constitutional right to effective assistance of counsel where defense counsel during the conduct of the trial failed to (1) conduct any voir dire examination of the jury and exercise any challenges of the jury panel members, (2) make an adequate opening statement, (3) object to the introduction of prejudicial demonstrative evidence,(4) request Jencks material after the completion of direct examination of each government witnesses, (5) complete cross-examination as to the bias of a key government witness, (6) object to the introduction of inadmissible hearsay evidence, (7) properly impeach three witnesses, with prior inconsistent statements, requiring an explanation and apology to the jury and the assumption of counsel's job by the judge, (8) move for judgment of acquittal out of the presence of they jury, (9) make adequate closing argument, (10) request an instruction on evaluating the credibility of witnesses where there is evidence of bias, and (11) request a jury poll.

* This case has not previously been before this Court.

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Miscellaneous

*Cases or authorities chiefly relied upon are marked by asterisks.

REFERENCES TO RULINGS

There was no published opinion below, and the trial court made no rulings pertinent to this appeal.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,942

UNITED STATES OF AMERICA

Appellee

-v-

JOHN J. HARRISON, JR.,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATEMENT OF THE CASE

I. Proceedings

This appeal arises out of the trial and conviction on August 21, 1969, of appellant, John J. Harrison, Jr., for assault with a dangerous weapon (22 D.C. Code, Sec. 502) and mayhem (22 D.C. Code, Sec. 506). On October 10, 1969, appellant was sentenced to three to nine years (Tr.106).

II. Statement of Facts

The trial, although taking place on two days - August 20 and 21, 1969 - lasted less than three hours and the jury deliberated for 45 minutes before returning a verdict of guilty on both counts of the indictment.

The trial began with a brief voir dire examination by the prosecutor which revealed that five members of the prospective jury panel had been on a panel where one of the prosecuting attorneys in this case had been the prosecutor. Defense counsel conducted no voir dire examination of the prospective jurors, failing to ask even the most basic question as to whether any of the jurors would be unable to render an impartial verdict and declared himself satisfied with the jury without exercising any peremptory challenges, even though two of the jurors and one of the alternates were among the five who had sat on a previous panel with one of the prosecuting attorneys. (Tr.3-6)

After the prosecutor's opening statement, defense counsel delivered an opening statement, quoted here in its entirety:

> Ladies and gentlemen of the jury, the defense in this case is the defense of self-defense. The defense will show that the complaining witness, Willie Sumpter, was attempting to strike the defendant with a knife at the time that the defendant defended himself. The defense will present witnesses who will state that they saw the knife. (Tr.8)

The prosecution called as its first witness, Mr. Sumpter, the complaining witness. During the direct examination of Mr. Sumpter, the prosecutor asked Mr. Sumpter to walk in front of the jury box to show the jury his eye as it is now. Defense counsel did not object.

Mr. Sumpter walked in front of the jury box and at the request of the prosecutor pointed to the area where he was cut, turning to face the jury so the jury could see where he was pointing. (Tr.18)

At the conclusion of the direct examination of Mr. Sumpter, and before beginning cross-examination, defense counsel did not request Jencks[1/] material or inquire into the existence of statements by the witness to government agents. (Tr.20)

During his cross-examination of Mr. Sumpter, defense counsel started to inquire into the nature of the relationship between Mr. Sumpter and Mrs. Mitchell, the only eyewitness to the cutting. Defense counsel's questions elicited from Mr. Sumpter the information that although Mr. Sumpter and Mrs. Mitchell were not married to each other, he was the father of her five-year old child and continued to contribute financially to the support of that child. He did not inquire further. (Tr.24-25)

The prosecution next called Mrs. Mitchell, the only eyewitness to the cutting. At the conclusion of the prosecution's direct examination of Mrs. Mitchell, defense counsel again failed to request Jencks material or inquire into the existence of any statements to government agents. (Tr.37) Defense counsel cross-examined Mrs. Mitchell as to the cutting incident. (Tr.37-42) Even though defense counsel had indicated to the court that the purpose of his questions to Mr. Sumpter

1/ 18 U.S. Code, Sec. 3500, providing for the production of certain statements of witnesses made to government agents.

was to lay a foundation to show that Mrs. Mitchell was biased in favor of Mr. Sumpter, defense counsel asked no questions of Mrs. Mitchell about the nature of her relationship with Mr. Sumpter.

Defense counsel attempted to impeach Mrs. Mitchell with a statement she had allegedly made to an investigator. (Tr.39-40) Several minutes later, after defense counsel indicated he had finished his cross-examination, the prosecutor at the bench pointed out to the court that defense counsel had impeached her with a statement actually made by Mr. Sumpter, and requested the court to instruct defense counsel to correct the impression given to the jury. The court instructed defense counsel to tell the jury the investigator obtained the information from Mr. Sumpter. Defense counsel began an apology and explanation to the jury, in the middle of which the prosecutor objected, and which the court was forced to finish by explaining to the jury that the information had been obtained from Mr. Sumpter and not Mrs. Mitchell. (Tr.42-43) At the conclusion of this incident, the court excused the jury until the next morning.

The prosecution the next morning first called Officer William A. Williams, and during his direct examination elicited hearsay testimony from Officer Williams that Mr. Sumpter had told him he had been cut by John Harrison at 222 W Street, where Mrs. Mitchell lived. Officer Williams also testified that Mrs. Mitchell told him Mr. Sumpter was cut during an argument between Mr. Sumpter and Mr. Harrison. (Tr.46)

At the conclusion of defense counsel's cross-examination of

Officer Williams, the government rested, and defense counsel made a motion for judgment of acquittal in the presence of the jury which the court denied, also in the presence of the jury. (Tr.49)

Defense counsel first called appellant to testify, and then called Mr. Nathaniel Harvey. During his direct examination of Mr. Harvey, defense counsel claimed surprise (Tr.68) and attempted to impeach Mr. Harvey with a prior written inconsistent statement. After having Mr. Harvey's signed statement marked for identification, defense counsel went on to other matters, failing to impeach the witness with the statement. He announced that he had no further questions, and the court then used the statement in asking the witness a few questions. (Tr.68-70)

Defense counsel next called Mr. Charles Martin as a witness. (Tr.73) Defense counsel also claimed surprise with this witness. (Tr.75) Defense counsel had Mr. Martin's statement marked for identification and the court asked the witness several questions based on his statement. (Tr.76-77) Defense counsel then read the short statement to the jury. (Tr.78)

At the conclusion of all the evidence, defense counsel again moved for a judgment of acquittal in the presence of the jury and the trial judge denied that motion, also in the presence of the jury. (Tr.82)

Subsequently, during a discussion about instructions, defense counsel did not request an instruction on evaluating the credibility

of witnesses when evidence of a witness' bias has been introduced. (Tr.82-85)

After the prosecutor's closing argument, defense counsel presented his closing argument, which consumes only two pages of the trial transcript. (Tr.88-90) Defense counsel rebutted the prosecutor's indication that appellant had a duty to retreat and further touched upon the testimony showing Mrs. Mitchell's bias, a previous argument between Mr. Harvey and Mr. Sumpter during which Mr. Sumpter drew a knife, a previous incident between Mr. Sumpter and appellant and the resulting deterioration of their friendship, and appellants' knowledge of rumors indicating that Mr. Sumpter was "out to get him." (Tr.90) He did not discuss the testimony of defense witnesses indicating that Mr. Sumpter had a knife that night. He did not review his client's testimony as to how the cutting occurred. Nor did he discuss the presumption of innocence and the requirement that all essential elements of the offenses must be proved beyond a reasonable doubt, and that evidence of self-defense having been introduced, the government must prove beyond a reasonable doubt that the defendant did not act in self-defense and the defendant does not need himself to prove self-defense. He failed to discuss what self-defense means. Finally, he failed to summarize the evidence, point out the strengths of his client's case and criticize the weaknesses of the government's case.

The Court charged the jury after a luncheon recess. (Tr.92-103) The charge did not include any instruction that evidence of bias could

be taken into account in evaluating the credibility of the witnesses. on the other hand, the trial judge did instruct the jury that

> The defendant has an interest in the outcome of this trial, of course, and in considering his testimony and in testing its truth and weighing its force you may do so in the light of that interest, as well as in the light which may have been shed by all of the evidence in the case. Give the testimony only the weight to which you, in your judgment, think it is entitled to when tested by these considerations and in light of all the evidence. (Tr.97)

At the end of the instructions, defense counsel did not request an additional instruction on evaluating the credibility of witnesses when evidence of bias has been presented, nor did he object to the instructions as given by the court.

The jury returned a verdict of guilty on both counts after deliberating for 45 minutes. (Tr.104) After the announcement of the verdict, defense counsel did not request a jury poll and the jury was excused without having been polled to determine if its verdict was freely given and unanimous.

ARGUMENT

THE DEFICIENCIES IN DEFENSE COUNSEL'S REPRESENTATION OF APPELLANT IN THE CONDUCT OF HIS TRIAL, AS A TOTALITY, DENIED APPELLANT THE EFFECTIVE ASSISTANCE OF COUNSEL

A. An accused has a constitutional right to the effective assistance of counsel

The Sixth Amendment to the United States Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel in his defense." If an accused is financially unable to retain counsel of his or her own choice, the court must appoint counsel to represent him or her. Johnson v. Zerbst, 304 U.S. 458 (1938). The accused's right to the assistance of counsel is violated if court-appointed counsel fails to render effective assistance in defense of his or her client, for the failure of the court to make an "effective" appointment of counsel constitutes a denial of due process. Powell v. Alabama, 287 U.S. 45, 71 (1932); Mitchell v. United States, 104 U.S.App.D.C. 57, 259 F.2d 787 (1958), cert. den. 358 U.S. 850 (1958); United States v. Hammonds, ___ U.S.App.D.C. ___, 425 F.2d 597 (1970).

Since 1967, the standard in the District of Columbia for determining whether an accused has been denied effective assistance of counsel on a motion to vacate sentence (28 U.S.C., Sec. 2255) is that an accused is denied effective assistance of counsel where "there has been a gross incompetence of counsel and ... this has in effect blotted out the essence of a substantial defense ... ." Bruce v. United States, 126 U.S.App.D.C. 336, 339-340, 379 F.2d 113 (1967); Scott v. United States, ___ U.S.App.D.C. ___, 427 F.2d 609 (1970). While the accused has a heavy burden in showing the requisite unfairness for reversing a

conviction, that burden is lesser on direct appeal than in a collateral attack on the conviction. Bruce v. United States, supra, 126 U.S.App.D.C. at 340. See, e.g., Dyer v. United States, 126 U.S.App. D.C. 312, 379 F.2d 89 (1967). Prior to Bruce v. United States, supra, the burden an accused was required to meet was that counsel's incompetence rendered the trial "a farce and a mockery." See, e.g., Mitchell v. United States, 104 U.S.App.D.C. 57, 259 F.2d 707 (1958), cert. den. 358 U.S. 850 (1958); Edwards v. United States, 103 U.S.App.D.C. 152, 256 F.2d 707 (1958). The Court of Appeals indicated in Bruce that the words " a farce and a mockery" were not to be taken literally, but rather as a description of the accused's heavy burden in showing the requisite unfairness. 126 U.S.App.D.C. at 339.

In Scott v. United States, supra, the Court of Appeals explained that the farce-mockery standard is no longer valid as such but exists in the law only as a metaphor that the defendant has a heavy burden to show requisite unfairness" and that the "appropriate standard for ineffective assistance of counsel, set forth in Bruce ... is whether gross incompetence blotted out the essence of a substantial defense." 427 F.2d at 610.[2/]

In determining whether the accused has been denied effective assistance of counsel, the Court must look to the entire record,

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2/ Although many cases prior to Bruce discussed ineffectiveness of counsel, counsel has concentrated on cases decided since Bruce in light of the new modified standard set forth in Bruce for evaluating the effectiveness of representation by defense counsel.

United States v. Hammonds, supra, 425 F.2d at 602; Harried v. United States, 128 U.S.App.D.C. 330, 389 F.2d 281, 285 (1967), and the totality of omissions and errors made by counsel during trial may constitute a lack of adequate representation requiring reversal, even though any one of the actions or omissions in the conduct of the trial, standing alone, would not in itself constitute ineffective assistance of counsel. United States v. Hammonds, supra, 425 F.2d at 602, 604.

In Hammonds, where the Court of Appeals for the District of Columbia reversed the conviction and remanded for a new trial, the appellant specified as instances of ineffective assistance, trial counsel's failure to (1) appear at the arraignment, (2) conduct any voir dire examination of the jury, (3) make any opening statement to the jury, (4) cross-examine two of the four government witnesses, with only slight cross-examination of the other two witnesses, (5) request any jury instructions, including in particular an instruction on lesser-included offenses, (6) ake an adequate closing argument. The Court held that these specified actions or omissions in the conduct of the trial, taken together denied the appellant adequate representation in the preparation and trial of the case. The deficiencies in trial counsel's representation of this appellant, although not precisely the same deficiencies, are parallel and equally shocking.

B. The deficiencies in the representation of appellant at trial.

The appellant here specifies the following actions or omissions in the conduct of his trial: Trial counsel's failure (1) to conduct any

voir dire examination of the jury, and to exercise any challenge of the jury panel members; (2) to make an adequate opening statement; (3) to object to the introduction of prejudicial demonstrative evidence, i.e., the display by the complaining witness of his eye to the jury; (4) to request Jencks material after the completion of direct examination of each of government witnesses; (5) to complete cross-examination as to the bias of a key government witness; (6) to object to the introduction of inadmissible hearsay evidence, (7) to impeach properly three witnesses with prior inconsistent statement; requiring an explanation and apology to the jury and the assumption of counsel's job by the judge; (8) to move for a judgment of acquittal out of the presence of the jury; (9) to make an adequate closing argument; (10) to request an instruction on evaluating the credibility of witnesses when there is evidence of bias; and (11) to request a jury poll.[3/]

C. Evaluation of the prejudicial effect of each of the specified actions and omissions in the conduct of appellant's trial

1) Failure to conduct any voir dire examination of the jury panel and to exercise any challenges of members of the jury panel.

Every person accused of a crime is guaranteed by the Sixth Amendment of the United States Constitution the right to a trial by an impartial jury. The primary method of insuring that a particular jury

3/ These actions and omissions are presented and discussed in their chronological order in the trial rather than in order of importance.

is impartial is the voir dire examination of the jury panel to elicit information forming the basis for challenges for cause and peremptory challenges.

> "The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors will decide on the basis of the evidence placed before them, and not otherwise." Swain v. Alabama, 380 U.S. 202, 219 (1965)

A defendant has an absolute right to have any juror who would be unable to consider impartially the evidence presented at trial and to render a fair and impartial verdict disqualified from service on the jury. Further, the right to exercise peremptory challenges is "one of the most important of the rights secured to the accused." Pointer v. Texas, 151 U.S. 396, 408 (1965). Thus, "[the] denial or impairment of the right [to exercise peremptory challenges] is reversible error without a showing of prejudice, Lewis v. United States, 146 U.S. 370, 30 S.Ct. 136, 36 L.Ed. 1011; Harrison v. United States, 163 U.S. 140, 16 S.Ct. 961, 41 L.Ed. 104; ..." Swain v. Alabama, supra, at 380 U.S. 202, 219 (1965).

Defense counsel did not ask a single question of members of the jury panel. (Tr.5) Defense counsel could have explored many possible avenues of voir dire examination which may have revealed partiality sufficient to sustain a challenge for cause or indicating the wisdom of peremptorily challenging that individual. For example, a matter of great concern in selecting a jury in this case would have been whether any jury panel member had been the victim of a crime, in particular a

crime involving the use of knives, or have close relatives who had been victims of such crimes. This area of possible prejudice has been deemed so important that it may require further individual examination out of the presence of other jury panel members to determine the influence of that experience on the juror's ability to render a fair and impartial verdict. See United States v. Ridley, 134 U.S.App.D.C. 79, 412 F.2d 1126 (1969). Voir dire examination may have revealed that certain members of the jury panel had themselves been employed by a law enforcement agency or had close relatives so employed. Some of the prospective jurors may have been involved in some way with domestic quarrels involving the use, or the threat of use, of knives. Although the above is not an exhaustive list of relevant areas of voir dire inquiry, it indicates several areas which should have been explored to guarantee that the appellant would receive a trial by an impartial jury. Above all, defense counsel failed to ask even the most basic question: Would any of you be unable for any reason to render an impartial verdict in this case? Had he asked this question, perhaps one of the jurors would have responded in the affirmative. Without this inquiry having been made, there is no way for this court to determine that the jury was impartial and rendered an impartial verdict.[4/] Since an impartial jury is the touchstone of a fair trial,

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4/ Neither the prosecutor nor the court asked the jurors any question which would have elicited whether any juror would be unable to make an impartial verdict.

defense counsel's failure to conduct any voir dire examination to determine which jurors could not be impartial or probably would not be impartial because of their affiliations or experiences prejudiced his client's constitutional right to trial by an impartial jury.

In addition, defense counsel failed to exercise any peremptory challenges even though two prospective jurors and one alternate had sat on cases where one of the prosecuting attorneys in this case had been the prosecutor. (Tr.4-6) In view of his failure to conduct any voir dire examination - even the bare minimum necessary to protect his client's rights - one cannot assume his failure to exercise any peremptory challenges was a tactical decision. One must conclude that this failure too was part of the pattern of inattention to his client's interests, impairing appellant's right to a fair trial.

2) Failure to make an adequate opening statement.

The purpose of an opening statement is to inform the jury what the case is about and to outline the evidence that will be introduced in order to provide to the jury a guide through the frequently confusing unfolding of the case through the fragmented examination and cross-examination of the witnesses. While the prosecutor went into some detail in his opening remarks, defense counsel's opening statement was exceptionally sketchy. It consisted of three sentences:

> "Ladies and gentlement of the jury, the defense in this case is the defense of self-defense. The defense will show that the complaining witness, Willie Sumpter, was attempting to strike the defendant with a knife at the time that the defendant defended himself. The defense will present witnesses who will state that they saw the knife." (Tr.8)

This statement was of little use in the representation of the apellant. It fails to show the particulars of how Mr. Sumpter was attempting to strike the defendant, how Mrs. Mitchell was attempting to restrain Mr. Sumpter, how the appellant was compelled to strike back in order to protect himself from bodily injury. It also failed to show that the evidence would show prior conflict between the appellant and the complaining witness, and appellant's fear of Mr. Sumpter, based on having heard rumors that Mr. Sumpter was out to get appellant, resulting in appellant's continuous carrying of a machete. In addition, the opening statement did not outline that the evidence would show that one of the defense witnesses actually saw Mrs. Mitchell take Mr. Sumpter's knife from him after the fight and that another defense witness saw Mr. Sumpter's knife on the kitchen table after the fight. Knowledge of all of these facts was essential for the jury to listen objectively to the prosecution's evidence.

3) Failure to object to the introduction of prejudicial evidence.

During the trial, the prosecutor asked Mr. Sumpter, the complaining witness to walk in front of the jury box to show the jury his eye and face as it was at that time. Mr. Sumpter did so. (Tr.18) Defense counsel failed to object to this demonstration inspite of the fact that such a display of disfigurement would have a prejudicial effect on the jury. Upon objection, by defense counsel, the court could have determined that the prejudicial effect of such a display outweighed its probative value, and excluded such a display, espe-

cially since the jury could evaluate the degree of disfigurement from where Mr. Sumpter was seated in the witnessbox. See, e.g., Proposed Federal Rules of Evidence, 4-03, stating the well-established rule that "although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice..." See also, People v. Cavanaugh, 44 Cal. 2d 252, 282 P.2d 53 (1955) where the Supreme Court of California held that the introduction into evidence for the purpose of fingerprint identification of three fingers, cut off during an autopsy, was improper and error, but in the circumstances of that case, harmless error. It was arguably within the discretion of the court to find that the prejudicial impact of the close-up viewing of Mr. Sumpter's scarred face did not outweigh its probative value,[5/] but without defense counsel's objections, the trial judge did not have occasion to make such a judgment.

4) Failure to request Jencks material at conclusion of direct examination of each government witness.

Under the Jencks Act, 18 U.S. Code, Sec. 3500, upon motion by the defendant at the conclusion of the direct examination of a government witness, the government must produce for use by the defendant any statement made by the witness to a government agent, which relates to the subject matter as to which the witness has testified.

5/ See also, McIntyre v. State, 379 P.2d 615 (Alaska 1963); State v. Martinez, 92 Idaho 183, 439 P.2d 691, cert. denied, 393 U.S. 945 (1968); Napier v. Commonwealth, 426 S.W. 2d 121 (Ky. 1968)(as to the admissibility of gruesome photographs in homicide cases being discretionary with the trial court).

Use of such statements are vital to effective impeachment cross-examination:

> Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony. Jencks v. United States, 353 U.S. 657, 667 (1957).

Production of statements by government witnesses is so vital that the government's inability to produce such a statement because it has been destroyed or lost is grounds for striking the government witness' testimony. Lee v. United States, 125 U.S.App.D.C. 126, 360 F.2d 834 (1966). See also, United States v. Bryant, ___ U.S.App.D.C. ___, ___ F.2d ___ (CADC, No. 23,957, Jan. 29, 1971).

Defense counsel neglected to request production of any statements by Mr. Sumpter or Mrs. Mitchell to government agents or even to inquire into the existence of any such statements.

It is possible, of course, that defense counsel requested the prosecutor to show him all Jencks material prior to trial and that he did examine such statements. But there may have been statements by government witnesses about which the prosecutor was unaware. Defense counsel is entitled to inquire into the possible or probable existence of such statements out of the presence of the jury. E.g., Campbell v. United States, 365 U.S. 85 (1961); Johnson v. United States, 121 U.S.

App. D.C. 19, 347 2d 803 (1965); Gregory v. United States, 125 U.S.App.D.C. 140, 369 F.2d 185 (1966). Once the defendant has made a prima facie showing that a statement exists, the trial judge must conduct a hearing, calling such extrinsic evidence as may be necessary, and determine whether the statement actually exists and is producible under the Jencks Act. E.g., Palermo v. United States, 360 U.S. 343 (1959), reh. denied, 361 U.S. 855; Campbell v. United States, supra; Saunders v. United States, 114 U.S.App.D.C. 345, 316 F.2d 346 (1963); Leach v. United States, 115 U.S.App.D.C. 351, 320 F.2d 670 (1963); Hilliard v. United States, 115 U.S.App.D.C. 86, 317 F.2d 150 (1963).

The appellant defended on the ground that he had acted in self-defense and presented some evidence in support of his defense. This case was a close one. Its outcome depended heavily on the consistency and credibility of the various witnesses' versions of the incident. Thus, earlier statements by the government witnesses as to what happened at the time of the cutting were particularly important to determine whether the witness' observations had been confused or whether their earlier versions differed from their version at trial. If such statements had been requested and produced, important contradictions may have appeared between the government witnesses' earlier statements, made closer to the time of the incident when their memories were fresher, and their testimony at trial. And even if defense counsel had reviewed some statements prior to trial, he should not have assumed those were all the statements in existence. To protect his

client's interests, it was extremely important that all statements, even those unknown to the prosecutor, be reviewed, and an inquiry into the existence of such other statements was imperative. Thus, his failure to request the production of Jencks material or to inquire into the existence of such statements contributed significantly to defense counsel's failure to provide effective representation for the appellant.

5) Failure to follow up adequately on the bias of one of the primary government witnesses.

During defense counsel's cross-examination of Mr. Sumpter, he started to inquire of Mr. Sumpter the nature of the relationship between Mr. Sumpter, who was the complaining witness, and Mrs. Mitchell, the only eyewitness to the cutting, in order to show bias on the part of Mrs. Mitchell, casting doubt on her credibility. Defense counsel's questions and Mr. Sumpter's answers revealed that although Mr. Sumpter and Mrs. Mitchell were never married to each other, he was the father of her five-year old child and continued to contribute financially to support of that child. His inquiry, however, was so minimal as to have little impact, and although defense counsel indicated that he expected Mrs. Mitchell's testimony to be that she was biased in Mr. Sumpter's favor (Tr.24), he failed to question Mrs. Mitchell at all as to the nature of her relationship with Mr. Sumpter and his continuing financial support of their child.

The bias of a witness is always relevant, Villaroman v. United States, 87 U.S.App.D.C. 240, 184 F.2d 261 (1950); Wynn v. United States,

130 U.S.App.D.C. 60, 397 F.2d 621 (1967), and as a result, an effort to show a witness' bias "may properly solicit over a wide range any information of potential value to the trier of fact in the assessment of credibility." Wynn v. United States, supra, 130 U.S.App.D.C. at 62. The reason for permitting such latitude in cross-examining to disclose bias on the part of a witness is apparent: a judgment as to the credibility of witnesses by the trier of fact is frequently crucial to a determination of the guilt or innocence. Thus, it is crucial that any information relevant to the credibility or bias of witnesses, or casting doubt on that credibility because of bias, be available to the trier of fact - the importance of such information is exemplified in this case: the testimony of the prosecution witnesses and the defense witnesses was diametrically opposed as to who was the aggressor in the fight resulting in injuries to Mr. Sumpter. Mr. Sumpter and Mrs. Mitchell testified that Mr. Harrison's assault was unprovoked and that Mr. Sumpter did not have a knife that evening. Appellant testified that Mr. Sumpter jumped appellant with a knife, Mrs. Mitchell attempted to push Mr. Sumpter back away from Mr. Harrison, and only then, in fear of bodily injury, did Mr. Harrison strike at Mr. Sumpter with his knife. The two other defense witnesses' testimony revealed that Mr. Sumpter did have a knife that evening at the time of the fight. The determination of guilt or innocence, then, depended heavily on a credibility contest between the two sets of witnesses. The close personal relationship between her and the

complaining witness, encompassing a child born to the two, and the complaining witness' continued financial support of their child was markedly relevant to the bias and credibility of Mrs. Mitchell, the sole eyewitness to the cutting. Defense counsel's failure to explore this area further with Mr. Sumpter and his failure to explore it at all with Mrs. Mitchell was a gross failure of his duty of effective representation of appellant. How substantial a failure it was is pointed up by the fact that had the trial court refused to permit defense counsel to explore these areas, such a ruling would have constituted reversible error. Alford v. United States, 282 U.S. 687 (1931); Villaroman v. United States, supra; Wynn v. United States, supra.

6) Failure to object to introduction of inadmissible hearsay evidence.

During the direct examination of Officer William Williams, the prosecutor elicited testimony as to what Mr. Sumpter and Mrs. Mitchell had told him about the offense. His testimony was inadmissible as hearsay. As shown above, the credibility of the witnesses was particularly important in this case. Mr. Sumpter and Mrs. Mitchell had previously testified in the same vein. To permit this testimony in a second time through an unbiased police officer measurably strengthened all the testimony of Mrs. Mitchell, a biased witness, and was thus prejudicial to the appellant.

7) Failure to properly impeach three witnesses with prior inconsistent statements.

During the cross-examination of Mrs. Mitchell, defense counsel attempted to impeach her with a statement she had allegedly made to an investigator (Tr.39-40) Several minutes later after defense counsel indicated he had finished his cross-examination, the prosecutor at the bench pointed out to the court that defense counsel had impeached her with a statement actually made by Mr. Sumpter, and requested the court to instruct defense counsel to correct the impression given to the jury. The court instructed defense counsel to tell the jury the investigator obtained the information from Mr. Sumpter. Without exploring other ways of curing his error, defense counsel began a rather confused apology to the jury, during which the prosecutor objected, and which the court was forced to finish by explaining to the jury that the information had been obtained from Mr. Sumpter and not Mrs. Mitchell. (Tr.42-43)

This error could not help but have an important impact on the jury's interpretation of other evidence introduced through defense counsel. It is possible that the jury saw the whole impeachment effort as an attempt to mislead them intentionally rather than as an honest mistake. It must be remembered that a jury to a considerable extent judges a defendant by judging his or her attorney. If the attorney presents the defense in a confused and weak manner, the jury may conclude that the defendant has a weak defense and the attorney is fishing around for something to say because there is nothing to say in the behalf of the defendant. Thus this error on the part of defense

counsel seriously prejudiced his client's case.

It is important to note that this "retraction" of the impeachment was the last statement heard by the jury on the first of two days of trial. The jurors were excused for the day following this abortive explanation and were left to conjecture freely about the meaning of this incident until court convened the following morning. Thus defense counsel's error - by itself prejudicial - was especially harmful to his client's defense.

On two other occasions, defense counsel failed to impeach witnesses effectively. Both defense witnesses surprised defense counsel as to their testimony about having seen the complaining witness' knife at the time of the altercation. He attempted to impeach both of them by prior written inconsistent statements. In examining Mr. Harvey, defense counsel had Mr. Harvey's signed statement marked for identification and then went on to other matters, failing to impeach the witness with the statement. He announced that he had no further questions and the court then used the statement in asking the witness a few questions. Although the court's questions to the witness, using the statement, may have partly corrected this error on the part of defense counsel, the proceedings must have been confusing to the jury and the impeachment - and the subject of the impeachment - was less than clear. More important, defense counsel failed in his duty to represent his client vigorously and the trial judge was forced to assume his role. As pointed out above, an attorney represents a

defendant in more ways than merely presenting evidence favorable to the defendant. In the eyes of the jury, defense counsel represents the defendant as a person, and defense counsel's behavior itself must at all times assert vigorously his client's defense. Defense counsel's passive behavior could not help but imply to the jury that there was not much in favor of his client for defense counsel to be vigorous about. Thus the court's impeachment, carried out because defense counsel failed to do so, must have had little or no impact on the jury and must also have discredited appellant.

Defense counsel also had difficulty impeaching Mr. Martin. After claiming surprise, defense counsel had Mr. Martin's statement marked for identification, and the court asked the witness several questions based on the statement. The judge may have felt it necessary to protect the defendant by carrying out the impeachment himself in light of defense counsel's prior abortive efforts at impeachment. Defense counsel then read the short statement to the jury. Once again, the proceedings were confused, the impeachment was unclear, and defense counsel's lack of enthusiastic representation was apparent to the jury.

On both occasions, proper detailed impeachment by defense counsel on such a significant factual issue - whether or not Mr. Sumpter had a knife at the time of the altercation - could have contributed a great deal to his client's defense. Defense counsel's failure to carry through the impeachment properly and vigorously contributed to his ineffective representation of his client.

In addition, defense counsel should have introduced the signed statements into evidence so that the jury could examine the contradictions more carefully. Gordon v. United States, 344 U.S. 414 (1953); Williams v. United States, 131 U.S.App.D.C. 153, 403 F.2d 176 (1968).

8) Failure to move for a judgment of acquittal out of the presence of the jury.

Defense counsel moved for a judgment of acquittal at the conclusion of the government's case-in-chief (Tr.49) and at the conclusion of all the evidence (Tr.82). Both of these motions were made and denied in the presence of the jury, without requesting that the jury be excused or approaching the bench. The court may take judicial notice that motions for judgment of acquittal are made out of the presence of the jury. The reason for this practice is apparent: for the jury to hear that a motion for judgment of acquittal is denied prejudices the defendant's right to an impartial determination of guilt or innocence by the jury. The jurors, as lay persons, are frequently substantially influenced by the conduct or opinion of a judge, "[f]or 'jurors hold the robed trial judge in great awe and reverence' and 'his lightest word or intimation is received with deference, and may prove controlling.'" United States v. Barbour, ____U.S.App.D.C. ____, 429 F.2d 1319, 1322 (1969) (footnotes omitted)

The jury, on hearing the presiding judge twice deny motions for a judgment of acquittal, as lay persons uninstructed in the legal standards for a directed verdict, may well have believed that the

judge had made a judgment that the defendant should not be acquitted. Thus, once again, defense counsel's failure to follow proper procedures prejudiced his client's defense.

9) Failure to request an instruction on evaluating the credibility of witnesses when evidence of bias is present.

As shown above, the credibility of the witnesses was crucial to the outcome of this case. Testimony elicited from Mr. Sumpter revealed a close quasi-conjugal relationship between Mr. Sumpter and Mrs. Mitchell, the only eyewitness to the altercation, and Mr. Sumpter's continued financial contribution to the support of their child. Such evidence indicated possible bias on the part of Mrs. Mitchell. However, the judge failed to instruct the jury that such evidence of bias could be taken into account in evaluating the credibility of the witnesses. Defense counsel failed to request such an instruction prior to the beginning of the charge to the jury. This failure is perhaps excused by the fact that defense counsel may have assumed that the judge would give Instruction No. 11 (Credibility of Witnesses) of the Criminal Jury Instructions for the District of Columbia in its entirety. This instruction includes a paragraph on bias:

> If you believe that any witness has shown himself to be biased or prejudiced, either for or against any side in this trial, you may consider and determine whether such bias or prejudice has colored the testimony of such witness so as to affect the desire and capability of that witness to tell the truth.

However, the trial judge failed to say anything about the effect or evidence of bias or prejudice on the evaluation of witnesses'

credibility. (Tr.96-97) Met with that important lack in the instructions, defense counsel, in order to effectively represent his client, should have requested the trial judge to instruct the jury as to this crucial factor.

The absence of any mention of bias on the part of the government witnesses was exacerbated by the instruction that

> The defendant has an interest in the outcome of this trial, or course; and in considering his testimony and in testing its truth and weighing its force you may do so in the light which may have been shed by all of the evidence in the case. Give the testimony only the weight to which you, in your judgment, think it is entitled to when tested by these considerations and in the light of all the evidence. (Tr.97)

Thus the jury retired to deliberate with instructions to be wary of the testimony of persons shown to be biased. Defense counsel, in order to protect the interests of his client was required to correct this imbalance.

10) Failure to give an adequate closing argument

Defense counsel's closing argument (Tr.88-90) consumes but two pages of the transcript. He rebutted the prosecutor's indication that the appellant had a duty to retreat and further touched upon the testimony showing Mrs. Mitchell's bias, a previous argument between Mr. Harvey and Mr. Sumpter during which Mr. Sumpter drew a knife, a previous incident between Mr. Sumpter and appellant and the resulting deterioration of their friendship, and appellant's

knowledge of rumors indicating that Mr. Sumpter was "out to get him." (Tr.90)

He failed to discuss the testimony of defense witnesses indicating, albeit via impeachment, that Mr. Sumpter had a knife that night. He failed to review his client's testimony as to how the cutting occurred. He failed to discuss the presumption of innocence and the requirement that all essential elements of the offenses must be proved beyond a reasonable doubt, and especially important, that evidence of self-defense having been introduced, the government must prove beyond a reasonable doubt that the defendant did not act in self-defense, and the defendant does not need himself to prove self-defense. He failed to discuss what self-defense means. In general, he failed to summarize the evidence, point out the strengths of his client's case and criticize the weaknesses of the government's case.

The Court of Appeals has on two occasions found a weak closing argument particularly significant as indicating ineffective assistance of counsel. In United States v. Hammonds, supra, where the Court of Appeals held that the cumulation of defense counsel's actions and omissions denied the appellant effective assistance of counsel, the Court said

> the totality of omissions and errors, and particularly the futile closing argument, clearly reflect a pro forma defense and a lack of adequate representation.... 425 F.2d at 604 (emphasis added)

The Court in Matthews v. United States, ___U.S.App.D.C. ___, ___

F.2d ___ (CADC No. 21,798, March 4, 1971) pointed out defense counsel's "casual summation" and stated "we cannot approve such a presentation as fulfilling counsel's obligation... . This we think was constitutional error." (slip. op. pp 4-5) The Court, however, did not reverse the conviction, because the ineffective representation by defense counsel was harmless error in light of the strong evidence against the appellant. This case, however, was a close one, and defense counsel's closing argument would have been an important factor in the jury's determination of guilt or innocence. Defense counsel's failure to summarize and discuss the evidence adequately in such a close case, contributed heavily to the denial of effective assistance of counsel to the appellant.

11) Failure to request a poll of the jury members

A jury's verdict of guilty is valid and controlling only if that verdict is freely given and unanimous. Anders v. United States, 333 U.S. 740 (1948). The primary means for ensuring that a verdict is freely given and truly unanimous is the jury poll. See, e.g., Federal Rules of Criminal Procedure 31(d), Humphries v. District of Columbia, 174 U.S. 190 (1899); United States v. McCoy, ___U.S.App. D.C. ___, 429 F.2d 739 (1970); Williams and Coleman v. United States, ____U.S.App.D.C.___, 419 F.2d 740 (en banc, 1970); United States v. Brooks, ___U.S.App.D.C.___, 420 F.2d 1350 (1969). A jury poll gives the court an opportunity, upon hearing from each individual juror as to his or her verdict,

> to ascertain with certainty that a unanimous verdict has in fact been reached and that no juror has been coerced or induced to agree to a verdict to which he has not fully assented [citing cases] Miranda v. United States, 255 F.2d 9, 17 (1st Cir. 1958). Quoted in Williams and Coleman v. United States, 419 F.2d at 750.

The significance of the jury poll is exemplified by the rule that a trial court's refusal to poll the jury, when timely requested, is grounds for a new trial. Williams and Coleman v. United States, supra; Miranda v. United States, supra; Mackett v. United States, 90 F.2d 462 (7th Cir. 1937).

Defense counsel's failure to request a jury poll means that the appellant was denied his right to have the trial court ascertain that the jury's verdict as stated by the foreman was fully assented to by all the jurors. It is not infrequent for jurors then polled to reveal disagreement with the verdict as announced by the foreman or forelady.[6/]

A jury poll may have disclosed a lack of the true unanimity required by law for a valid verdict. But there is no way to determine whether or not the verdict was unanimous since defense counsel failed to request a poll of the jury.

D. Conclusion

Each of these deficiencies in the conduct of the trial, viewed

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6/ See e.g., United States v. McCoy, supra; Williams and Coleman v. United States, supra; United States v. Brooks, supra; Jackson v. United States, 128 U.S.App.D.C. 214, 386 F.2d 641 (1967). Each of these cases discussed whether the procedures followed by the trial judge after a juror disagreed with the verdict as announced were proper.

as part of a pattern, reflect trial counsel's incompetence. Some of them, such as not objecting to hearsay testimony, or making a very brief opening statement, if taken individually, could be viewed as an exercise of defense counsel's judgment as to trial strategy. But others cannot be viewed in that light: for example, there is no excuse for failing to conduct any voir dire examination, even the most basic inquiry as to ability to render an impartial verdict, for moving for a judgment of acquittal in the presence of the jury, and neglecting to request a jury poll. These actions and omissions simply cannot be seen as trial strategy or tactics. When such a pattern of deficiencies includes such inexplicable actions or omissions, the "errors" which could separately be interpreted as mere ineptitude or trial tactics must be examined as part of the general pattern of gross deficiencies. In such circumstances, any assumption that these actions or omissions were trial tactics must fall.

An accused is entitled at trial to "representation by counsel acting... not as a passive friend of the court, but as a diligent, conscientious advocate at an adversary proceeding." United States v. Hammonds, supra, 425 F.2d at 601. The attorney's duty to his or her client includes not only diligent, but also zealous, representation. See American Bar Association, Code of Professional Responsibility, Canon 7. In this trial, defense counsel's representation of his client was hardly zealous - or even diligent. Where defense

counsel commits such egregious errors as failing to conduct any voir dire examination of the prospective jurors and failing to conduct a poll of the jury, thereby failing to protect his client's right to an impartial jury and to a freely given unanimous verdict, one can hardly conclude that defense counsel's representation of his client was zealous, diligent, or even adequate. Certainly the other deficiencies, when added to these two errors, amounted to a denial of appellant's constitutional right to effective assistance of counsel in his defense. The deficiencies taken together constituted gross incompetence, blotting out the essence of a substantial defense.

Therefore the judgment below should be reversed and the case remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing brief was served personally at the Office of the United States Attorney, Appellate Division, this 5th day of April, 1971.

Mary-Helen Mautner

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,942

UNITED STATES OF AMERICA, APPELLEE

v.

JOHN J. HARRISON, JR., APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
CHARLES F. FLYNN,
JAMES A. ADAMS,
Assistant United States Attorneys.

Cr. No. 768-69

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TABLE OF CASES

Cases—Continued

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

III

ISSUE PRESENTED *

In the opinion of appellee, the following issue is presented:

Whether the trial decisions made by defense counsel were so egregiously incorrect as to constitute gross professional incompetence and thereby deprive appellant of his right to the effective assistance of counsel?

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* This case has not previously been before this Court except on appellant's application for leave to appeal *in forma pauperis*. *Harrison* v. *United States*, Misc. No. 3594.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,942

UNITED STATES OF AMERICA, APPELLEE

v.

JOHN J. HARRISON, JR., APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By a two-count indictment filed May 26, 1969, appellant was charged with assault with a dangerous weapon [1] and mayhem.[2] A jury trial commenced on August 20, 1969, before the Honorable Edward M. Curran, resulting in a verdict of guilty on both counts on August 21. Appellant was sentenced on October 10, 1969, to imprisonment for a term of three to nine years. On that same date a notice of appeal was filed. On October 16, 1969,

[1] 22 D.C. Code § 502.

[2] 22 D.C. Code § 506.

Chief Judge Curran filed a memorandum and order pursuant to Rule 24 (a), FED. R. APP. P., denying appellant leave to appeal *in forma pauperis* because in his opinion there were no grounds upon which an appeal could properly be taken and that the appeal was not taken in good faith. This court thereafter granted leave to appeal *in forma pauperis* in an order filed December 7, 1970. *Harrison* v. *United States*, Misc. No. 3594.

Selection of the jury commenced with a brief voir dire by the prosecutor in which he introduced the primary participants in the trial and discovered that five prospective jurors had sat on a panel in a case prosecuted by an Assistant United States Attorney who was going to sit at counsel table to assist the prosecutor. Each of the five prospective jurors was asked if the fact that he had sat on the other case would affect his decision in this case, and each replied in the negative; two of the five subsequently became jurors in this case. Defense counsel, after determining from the court that he did not have to introduce his witnesses, conducted no voir dire (Tr. 4-5).

After the jury was sworn, the Government in its opening statement briefly outlined the charges against appellant and the circumstances surrounding appellant's assault with a machete upon Willie Sumpter and the resultant loss by Mr. Sumpter of the sight in one eye. Defense counsel countered by stating concisely that appellant had acted only in self-defense in face of a knife attack by Mr. Sumpter and that witnesses had seen Mr. Sumpter's knife (Tr. 6-8).

Appellant and Mr. Sumpter had been good friends for several years. During the 1968 Christmas season, however, Mr. Sumpter believed he had lost a wallet at appellant's house. The wallet was never located, and from that time their friendship deteriorated (Tr. 10, 22-27, 52-53). Appellant testified that he had heard that Sumpter was out to "get" him, although he had seen Sumpter several times since the wallet was lost, and Sumpter had not made any threats (Tr. 53, 63-64). One defense witness was able

to confirm only that he understood appellant was afraid of Mr. Sumpter (Tr. 79).

On the night of the assault, several persons, including appellant, visited the home of Marie Mitchell, the only eyewitness to the offense (other than Sumpter himself). She and Mr. Sumpter testified that immediately prior to the assault Nathaniel Harvey and Charles Martin were together in the bedroom; she was standing at the kitchen sink; Sumpter was sitting at the kitchen table facing the only entrance to the kitchen; and appellant was standing in that entrance. Someone in the bedroom called appellant, and Sumpter told him not to cause a disturbance. Appellant then came into the kitchen waving a machete which he had previously held behind his back. As Sumpter rose, Mrs. Mitchell pushed him back off balance and got between Sumpter and appellant in order to protect Sumpter. Appellant, however, reached over her shoulder and struck Mr. Sumpter with the machete, opening a wound extending from Sumpter's eyebrow to his lip and leaving his "eye . . . hanging out" (Tr. 16). Mrs. Mitchell and Sumpter both testified that Sumpter did not have a knife (Tr. 9-22, 25-26, 28-34, 36-38, 41-42).

Harvey and Martin, who were in the bedroom trying to straighten out a dispute, heard a scream and rushed to the kitchen (Tr. 12, 37-38, 71, 76). Martin testified that he saw a closed pocket knife on the kitchen table that might have been Sumpter's (Tr. 75-78, 81, 82). Harvey did not see any weapon other than appellant's machete, although he found Sumpter's knife in Sumpter's coat pocket the next day and assumed that Mrs. Mitchell had put it there (Tr. 68-70).

Appellant claimed that when he arrived at Mrs. Mitchell's apartment she told him to wait outside for Martin. She opened the door, and as he was starting to leave, Sumpter attacked him without provocation. Mrs. Mitchell tried to push Sumpter back, but to little effect. Withdrawing the machete from his pants leg rather than going out the open door, appellant defended himself by poking the machete at Sumpter over Mrs. Mitchell's shoulder.

Then, "by him [Sumpter] wrestling with her he hit his eye on it [the machete]" (Tr. 52). Appellant further claimed that he carried the machete out of fear of Sumpter and that everyone knew he carried it (Tr. 50-64). His own witnesses, each a friend of both the victim and appellant, were unable to confirm that appellant always carried a machete (Tr. 79, 81), and there was no evidence presented to indicate that Sumpter was out to harm appellant.

ARGUMENT

The record clearly refutes appellant's contention that the cumulative effect of defense counsel's conduct of the trial was so grossly incompetent that it blotted out the essence of a substantial defense.

(Tr. 3-104)

Appellant enumerates eleven specific actions and omissions of defense counsel which he asserts, when considered cumulatively, denied him the effective assistance of counsel in the preparation and presentation of his defense. Effective assistance is, however, a procedural requirement and does not go to the quality of the assistance. *Mitchell* v. *United States*, 104 U.S. App. D.C. 57, 259 F.2d 787, *cert. denied*, 358 U.S. 850 (1958). Appellant therefore has the extremely heavy burden of demonstrating that defense counsel was so grossly incompetent that his actions "blotted out the essence of a substantial defense." *Bruce* v. *United States*, 126 U.S. App. D.C. 336, 379 F.2d 113 (1967); *see Scott* v. *United States*, 138 U.S. App. D.C. 339, 427 F.2d 609 (1970); *Harried* v. *United States*, 128 U.S. App. D.C. 330, 389 F.2d 281 (1967).

Appellant hopes to prove that he was denied effective assistance of counsel through the sheer number of defense counsel's actions on which he now speculates concerning possible alternatives. It is not the function of an appellate court, however, to make a retrospective evaluation of

trial tactics from an uninvolved reading of the printed record. *United States* v. *Hammonds*, 138 U.S. App. D.C. 166, 425 F.2d 597 (1970); *Mitchell* v. *United States*, *supra*. The question is not whether another attorney, applying hindsight, would have conducted the trial differently, nor even whether defense counsel made mistakes. *Bruce* v. *United States*, *supra*; *Edwards* v. *United States*, 103 U.S. App. D.C. 152, 256 F.2d 707, *cert. denied*, 358 U.S. 847 (1958).[3] Rather, the question for review is whether defense counsel was so grossly incompetent that appellant was denied his Sixth Amendment right to the assistance of counsel and consequently received no defense.

The answer is emphatically in the negative. Defense counsel hired an investigator to check facts (Tr. 40); he interviewed witnesses and received signed statements which he later used at trial (Tr. 42-43, 68-69, 76-77); he cross-examined witnesses extensively to show bias (Tr. 24-25) and to substantiate the facts surrounding appellant's claim of self-defense; he elicited testimony concerning Sumpter's malevolent character and his possible reasons for wanting to harm appellant in order to increase the probability that the jury would believe the claim of self-defense; he submitted a motion to the court requesting a particular instruction on self-defense; and he concisely summed up appellant's position concerning his reasons for carrying the machete, Sumpter's violent nature and the bias of the single eyewitness, Mrs. Mitchell. Defense counsel, in other words, conducted a strategically defensible trial in a difficult case and provided the jury with ample opportunity to consider the merits of appellant's defense.

Defense counsel should not be forced to conform to a litany of questions that must be asked and motions that must be made in order to forestall charges of profes-

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[3] "Mere improvident strategy, bad tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective assistance of counsel . . . ." *Edwards*, *supra*, 103 U.S. App. D.C. at 153, 256 F.2d at 708.

sional incompetence. Questions and motions that could or should be asked in some cases are clearly inappropriate in other cases where they can harm the defense or cannot be presented in good faith.

While it is impossible to guess accurately defense counsel's ratiocination in this case by merely reading the record, appellee will here suggest possible explanations for the actions or omissions which allegedly deprived appellant of the effective assistance of counsel and will endeavor to clarify the context in which those actions were taken.

A. *Voir Dire and Exercise of Peremptory Challenges*

The nature and extent of voir dire of a prospective jury panel is best left to the discretion of the particular trial attorney who can view the prospective panel and, considering the nature of the defense, can determine what, if any, voir dire will be beneficial to his client. Waiver of voir dire in this case may have constituted an attempt to indicate to the jury appellant's confidence that his defense was so unassailable that any twelve persons would be certain to bring in a verdict of not guilty. Possible hidden prejudice of a juror is alleviated by the juror's oath to bring in a true verdict in accordance with the evidence.

In this case, five prospective jurors had sat on a case tried by an Assistant United States Attorney who was merely at counsel table to consult with the prosecutor. Each of the five indicated that participation in the earlier case would not influence his judgment in this case. Two of those five were subsequently chosen for the jury panel. Although defense counsel could have used peremptory challenges to eliminate them, it might not have been in his client's interest to do so. Each had indicated that the past service would not influence his judgment, and failure to challenge was consistent with the tactic of displaying confidence in the merits of the defense.

B. *Opening Statement*

Appellant suggests that one measure of the incompetence of defense counsel's opening statement is its lack of quantity.[4] This was not, however, a factually confusing case. The only element of contention lay in proof of an assault as opposed to self-defense. Thus, when the prosecutor briefly outlined the charges against appellant and alleged that appellant attacked Mr. Sumpter without provocation, it was quite proper for defense counsel to counter with a concise statement that appellant had acted in self-defense when attacked by Sumpter and that witnesses had seen Sumpter's knife. This opening statement is also consistent with the tactic of imbuing the jury with a sense of the unqualified truth of appellant's defense.

C. *Real Evidence*

Appellant complains that his defense counsel should have objected to Mr. Sumpter's demonstration to the jury of the extent and severity of the injury he received from hitting his eye on appellant's machete. The general principle of law with respect to real evidence, as stated in 4 WIGMORE, EVIDENCE § 1150 (3d ed. 1940), is that an autoptic proference is always proper unless specific reasons of policy apply to limit the showing. In this case the severity of the injury to Sumpter's eye was necessary to prove mayhem and was also relevant to disprove appel-

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[4] All of the facts that appellant now claims should have been mentioned in the opening statement were brought out during the trial. Further, some of the information appellant suggests as proper for the opening later turned out to be inaccurate. The witness who allegedly "saw Mrs. Mitchell take Mr. Sumpter's knife from him after the fight" (Br. 15) merely testified that he found the knife in Sumpter's coat pocket the next day and had assumed Mrs. Mitchell put it there. The defense witness who allegedly saw Sumpter's knife on the kitchen table could testify only that he saw a *closed* pocket knife that *looked like* Sumpter's on the table.

As this Court well knows from reviewing countless records in other cases, it is common practice for defense counsel in criminal cases to waive opening statement entirely. This case clearly illustrates why that is so often a wise and desirable tactic.

lant's claim that Sumpter "somehow or other cut his eye" by bumping it on appellant's machete. Normally, the prejudice resulting from a showing such as that involved here is the association of the defendant with the thing done. Appellant here, however, admitted the cutting; he merely disputed the cause of the injury. There was no cognizable prejudice here.[5]

It is also clear that objection to evidence is within the discretion of trial counsel. *Mitchell* v. *United States*, *supra*. Failure to object suggests that defense counsel correctly reasoned that the evidence was admissible, that it did not detract from the defense, and that it would therefore be improvident to make in front of the jury an objection which was very likely to be overruled.

D. *Jencks Act Statements*

Appellant here requests a new trial on the unfounded supposition that some Jencks Act statements *may have* existed which *may have* been relevant to testimony and *may have* been contradictory to such testimony. He thus ignores the disclosure in the record that defense counsel had statements from at least three of the four witnesses (Tr. 42-43, 68, 76-77). Each of the statements resulted directly from defense counsel's own efforts to prepare a proper defense. He sent an investigator to question the witnesses and interviewed witnesses in his office. Appellant also admits the very real possibility that defense counsel was assured both by his investigator and by the prosecutor that no other statements existed. Without knowing more about defense counsel's knowledge, and on the basis of the statements he did present, this Court should not characterize his conduct as incompetent or inattentive to his client's interests.

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[5] *Rivers* v. *United States*, 270 F.2d 435 (9th Cir. 1959), *cert. denied*, 362 U.S. 920 (1960) (competent evidence is not inadmissible merely because it is gruesome); *Eagleston* v. *United States*, 172 F.2d 194 (9th Cir), *cert. denied*, 336 U.S. 952 (1949).

E. *Bias*

Appellant is of course correct in stating that bias of a witness is relevant. *E.g.*, *Tinker* v. *United States*, 135 U.S. App. D.C. 125, 417 F.2d 542, *cert. denied*, 396 U.S. 864 (1969). To that end, defense counsel, stating in open court that his purpose was to show the bias of Mrs. Mitchell, elicited from Sumpter the admission that he was the father of Mrs. Mitchell's five-year-old child, for whom he contributed financial support. Defense counsel further showed the large amount of time Sumpter spent with Mrs. Mitchell. Counsel also specifically reminded the jury of this close relationship and possible bias in his closing statement. The jury was thus clearly and precisely informed of the nature of the relationship between the two prosecution witnesses.

Appellant contends also that the possibility of bias should have been pursued in cross-examination of Mrs. Mitchell. Without knowing what Mrs. Mitchell's answers would be, however, it is meaningless to speculate upon them. It is also possible that defense counsel was aware of adverse information that might have come out. For example, Nat Harvey, when asked if he was boarding at Mrs. Mitchell's, testified that on the day of the assault he was "staying there" (Tr. 65). He also stated that Smupter often came to Mrs. Mitchell's home because "he was a friend of ours" (Tr. 66). Earlier testimony showed Mrs. Mitchell's to be a one-bedroom apartment (Tr. 11). Therefore, inquiry of Mrs. Mitchell, who was appellant's cousin (Tr. 28, 37), could have revealed a relationship with Harvey that would have substantially diminished the efficacy of Sumpter's earlier testimony revealing possible bias.

F. *Hearsay Evidence*

Officer William A. Williams testified that he interviewed Mr. Sumpter at the hospital and was told by Sumpter that "he had been cut" by appellant (Tr. 45-46). The officer also stated that Mrs. Mitchell told him

that Sumpter had been cut during an argument with appellant (Tr. 46). Neither of these statements illuminates the circumstances of the cutting—*i.e.*, whether appellant was the aggressor or acted in self-defense. The truth of the statements related by Officer Williams was not in dispute, since appellant was admitting the cutting but claiming self-defense. Further, objection to evidence is within the discretion of trial counsel. *Mitchell* v. *United States*, *supra*. In this instance, an objection would not have been beneficial and would possibly have suggested to the jury that the officer knew some information which appellant wished to conceal.

G. *Impeachment*

Defense counsel attempted to impeach Mrs. Mitchell by means of a prior inconsistent statement. While cross-examining her about the statement, he brought out references to the large amount of alcohol consumed by Sumpter and his friends prior to the assault. The statement, however, was in fact made by Sumpter. The court then requested that counsel explain the error to the jury. Contrary to appellant's characterization of the explanation as confused and requiring the assistance of the court, counsel started to disclose that the statement had been made by Sumpter. The prosecutor quickly objected to prevent defense counsel from making that disclosure. The court, apparently somewhat exasperated by the prosecutor, stated: "There is nothing secretive about this. The information gotten by the investigator was obtained from Sumpter and not from this woman." (Tr. 43.) The foregoing hardly appears to be incompetence requiring the assistance of the court.

With respect to Mr. Harvey, defense counsel claimed surprise and had marked for identification a purportedly inconsistent statement (Tr. 68-69). Counsel, however, did not develop any inconsistency. He may have been aware of the information subsequently brought out by the court; the statement said that Mrs. Mitchell took the knife from

Sumpter after the fight, but Harvey explained that he had not seen that happen and had only assumed it to be true because she was the only person there. Thus the court did not correct counsel's error. Rather, it clarified that the prior statement was not inconsistent, possibly to the detriment of appellant. It is also possible that defense counsel was not going to clarify the document, but might later try to move it into evidence so that the jury could read Harvey's statement without benefit of clarification.

With respect to Martin, the impeachment proceeded as follows. Martin testified that he had seen Sumpter with a knife occasionally in the past; he said he saw a knife on the kitchen table after the assault, but he could not say it was Sumpter's; he then stated he was in the kitchen when Sumpter was cut.[6] Here counsel claimed surprise (Tr. 75). It appears that the court was also surprised by Martin's last statement and quickly proceeded to question him about the knife and his presence at the cutting (Tr. 75-77). Defense counsel also cross-examined with respect to the knife and read to the jury Martin's prior inconsistent statement (Tr. 77-78).

Taking all three witnesses together, it appears that all material information was presented to the jury for its consideration without any undue prejudice to appellant.

H. *Motions for Judgment of Acquittal*

Defense counsel, in the presence of the jury, moved for a judgment of acquittal at the conclusion of the Government's case and at the conclusion of the defense. Both motions were denied. Although it is better practice to make such motions at the bench, counsel's failure to do so in this instance did not constitute incompetence. Neither motion included any discussion as to why it should be granted or denied, and in each instance the

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[6] Q. Were you in the room when Willie Sumpter's eye was cut?
A. Yes.
Q. Did you see his eye cut?
A. I saw his eye cut; yes. (Tr. 75.)

court did not offer an explanation for its denial. No inferences could reasonably be drawn concerning the effect such brief statements would have on the jury. Consideration must also be given to the instruction to the jury regarding the heavy burden on the government to prove guilt beyond a reasonable doubt, which surely eliminated any potential prejudice resulting from denial of the motions in the presence of the jury.

I. *Instructions*

Appellant contends that defense counsel erred in failing to request an instruction on bias. Defense counsel did file a motion requesting an instruction on self-defense, and, as appellant admits, counsel probably expected the court to give an instruction on bias without a request. The "red book" instruction was not given,[7] but the court did instruct as follows:

> In judging the evidence you must, necessarily, evaluate the testimony of the individual witnesses. Only thus can you determine the truth; and it is the truth that you must seek. And so bring to this task your knowledge of human nature, your ability to judge men, their source of knowledge, their intelligence, their motives, their intentions, in order that you may discern the real character behind the spoken word and measure its weight of truth and accuracy.
>
> In this connection—that is, in passing upon the credibility of witnesses—you have a right to consider the manner of testifying when the witness was on the stand; whether the witness was evasive; whether there was a tendency to distort; whether the witness was frank and candid in his testimony; whether the witness was contradicted on material facts; whether the witness had an interest in the outcome of the trial; whether the witness impressed you as a truth-telling individual; whether the witness impressed you as a person having an accurate memory and recollection. (Tr. 96.)

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[7] JUNIOR BAR SECTION OF D.C. BAR ASS'N, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, No. 11 (1966).

This instruction, together with references in counsel's closing statement to the relationship between Sumpter and Mrs. Mitchell (Tr. 89), adequately prepared the jury to give to the testimony of each witness such weight as the jury thought it deserved.

J. *Closing Argument*

Appellant chastises defense counsel for the brevity of his summation. He also attempts to equate the closing arguments in *Matthews* v. *United States*, D.C. Cir. No. 21,798, decided March 4, 1971, supplemental opinion June 11, 1971, and *United States* v. *Hammonds*, *supra*, with that rendered here. Unlike the situation in those cases, however, counsel here took an affirmative stance and informed the jury that, contrary to the implication of the prosecutor, appellant had no duty to run rather than to defend himself (Tr. 88-89). He specifically pointed out the virtual family relationship existing between Sumpter and Mrs. Mitchell and emphasized that her testimony would naturally favor Sumpter (Tr. 89). He reminded the jury that Sumpter had had a great deal to drink that night and had on a prior occasion drawn a knife in an argument with a friend (Tr. 89). He also reminded the jury of the lost wallet episode and the resultant deterioration of the friendship between appellant and Sumpter (Tr. 90). Reference was made to the rumors that Sumpter wanted to harm appellant (Tr. 90). Counsel then summed up by stating that appellant carried the machete only for protection from Sumpter and that Sumpter had attacked him (Tr. 90). The case was neither long nor factually confusing; a detailed review of the evidence was not necessary. The closing was clearly not the casual summation presented in *Matthews* v. *United States*, *supra*, or *United States* v. *Hammonds*, *supra*.

K. *Polling the Jury*

Appellant suggests that failure to request a *pro forma* poll of the jury in every case will open defense counsel to

allegations of incompetence. A jury poll is not an absolute requirement of the law, however, and failure to request a poll does not weaken or invalidate a verdict.[8]

The verdict was rendered in open court by the jury foreman, and the entire panel affirmatively responded to the question whether that was the verdict of every member of the panel. Appellant does not specify anything stated or done which indicates in any way that the jurors were or could have been confused. The case was simple, involving only one defendant charged with two counts growing out of one incident. No confusion is evident or even probable.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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[8] The jury poll "is not a matter which is vital, is frequently not required by litigants; and while it is the undoubted right of either, it is not that which must be found in the proceedings in order to make a valid verdict." *Humphries* v. *District of Columbia*, 174 U.S. 190, 194 (1899).

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